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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. TRESTON RAYAL JONES, Defendant and Appellant.	B239197 (Los Angeles County Super. Ct. No. MA052258)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lisa M. Chung, Judge. Affirmed.

Alexander P. Green, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, William N. Frank and Seth P. McCutcheon, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Treston Rayal Jones appeals from the judgment entered following a jury trial in which he was convicted of first degree burglary and four counts of first degree robbery, with gang findings. Defendant contends that the evidence was insufficient to support his conviction of robbing a young child and the trial court abused its discretion and violated defendant's confrontation and due process rights by excluding evidence that the victims may have misidentified his accomplice. We affirm.

BACKGROUND

About 7:50 a.m. on February 17, 2011, defendant and another man entered the Lancaster home of Lashawn Blaylock, her husband Jesse Blaylock, their children Viviana and Vincent, and Lashawn's 18-year-old daughter Lashawnda Scales. Jesse had just left the home to drive Viviana to school. The person with defendant was taller and had a gun. Lashawn saw him first and asked, "Who are you?" The man with the gun said, "It's a robbery." Defendant moved Lashawn, Scales, and Vincent into a bathroom, told them to stay there, and closed the door. Lashawn testified that Vincent was five years old, while Jesse testified that Vincent was four years old. Defendant returned to the bathroom numerous times, opened the door to check on them, and warned them not to escape. Lashawn saw defendant's face each time he returned. She knew she recognized him, but could not remember the context. Scales also thought defendant, who wore a "ring" in his pierced tongue, looked familiar.

While they were confined in the bathroom, Lashawn tried to comfort Vincent and Scales. Scales wanted to either escape through the bathroom window herself or put Vincent through the window to "go get help," but Lashawn talked her out of it because she feared the robbers would become violent if they noticed that one of the captives had escaped. At one point, defendant's companion "snatched" Lashawn from the bathroom and demanded to know where the money and safe were. Defendant and his companion referred to one another as "Blood," and one of them mentioned the name of Lashawn's son, Russell, who was in jail.

Jesse arrived home about 8:05 a.m. He noticed that the front door was open and its glass was cracked. Defendant's companion immediately confronted Jesse, told him it was a robbery, and asked him where the safe was. Jesse told the man that they had no safe. As defendant's companion pushed Jesse down a hallway, defendant "popped out" of the bathroom. Jesse recognized defendant from an encounter the night before in which defendant had knocked on the front door of Jesse's house. Jesse had not opened the door, but instead spoke to defendant through the adjacent kitchen window. Defendant had turned to face that window and had asked Jesse if Jessica was there. Jesse had gotten a good view of defendant's face the night before because the porch light was on and defendant was facing him. Jesse also testified that defendant's tongue was pierced and he wore a "tongue ring."

After defendant "popped out" of the bathroom, he got in front of Jesse and asked where the safe was. Jesse got a good view of defendant's face. Defendant's companion held Jesse by the collar while defendant ransacked the house. Defendant pulled Lashawn from the bathroom and asked her where the safe was. Defendant and his companion forced Jesse and Lashawn to disrobe and go into the master bathroom. Eventually the robbers left, taking currency and coins, jewelry, two mobile phones, and the house and car keys. Jesse testified the robbery lasted 15 to 25 minutes, Scales testified it lasted 30 minutes, and Lashawn testified it lasted more than 30 minutes.

Scales phoned 911 and reported the robbery. She told the operator that she had gotten a good look at the two men, whom she described as Black males in their twenties. (Defendant was 23 on the date of the charged crimes.) She stated that one of them had a mustache, beard, and a tongue ring, but she did not say anything about a tattoo. Jesse also spoke to the operator and stated he also got a good look at the robbers and recognized one of them as the man who had come to his door the night before asking for Jessica. Scales asked Jesse, "The one with the tongue ring?" Jesse replied, "Yep. It was him. He's the one who knocked on the door last night."

Scales told one of the responding sheriff's deputies that she recognized defendant from seeing him before, "but she wasn't sure from where." Lashawn testified that sometime after the robbery she remembered that she had seen defendant in the company of her son Russell on two occasions before the robbery: once at a market and once sitting in Russell's car when it was parked outside Lashawn's house. She also remembered that defendant had repeatedly asked her to be his friend on Facebook and had also asked if she wanted to purchase some food stamps. Lashawn logged onto Russell's Facebook account and found photographs of defendant. Scales printed the photographs and also e-mailed them to a detective. Three of these photographs were introduced in evidence at trial. One of them showed defendant with a stud-type of jewelry in his tongue and another piercing extending across his chin just below his lower lip. The stud was what Scales was referring to as "a tongue ring" when she spoke to the 911 operator. Scales also remembered seeing defendant with Russell at the Blaylock house and knew that defendant had sent her mother Facebook friend requests. She also saw the other robber among defendant's Facebook friends.

Jesse testified he looked at the Facebook photographs and immediately recognized defendant as the person who had come to Jesse's door the night before the robbery asking for Jessica and returned the next day to rob him. The tongue stud depicted in the prosecution exhibit showing piercings was what Jesse referred to as a "tongue ring."

Jesse and Lashawn testified that before Russell went to jail, he had posted on Facebook a photograph of himself in which he had a large stack of $1 bills topped with a couple of large denomination bills, so that it looked like he had a lot of money.

About 10 days after the crimes, Detective Roger Izzo individually interviewed Jesse, Lashawn, and Scales and showed each a photographic array. Each one selected defendant's photograph in the array. Lashawn wrote that defendant's photograph was "most similar" to the robber's. She explained that the photograph of defendant in the array was dark. Jesse told Izzo that defendant's photo was "closest to" depicting the robber because the photograph in the array was small and of poor quality. Scales wrote

"100%" next to defendant's picture on the photographic array because she was certain that he was the shorter robber. We have reviewed the arrays shown to the victims and note that defendant's photograph does not show his tongue ring or facial piercing, and the lighting in his photograph is quite poor.

Jesse, Lashawn, and Scales identified defendant at the preliminary hearing and trial as the shorter robber, not the taller one with the gun. Jesse was asked at trial whether he could see a tattoo on defendant's neck and said he could not.

Although the robbers were not wearing gloves and various surfaces in the Blaylock house were dusted for fingerprints, no fingerprints that were sufficiently complete for comparison were obtained. Izzo did not try to trace the location of the stolen phones because by the time he got the case, the victims had already terminated service on those phones.

Sergeant Mark Machanic of the Los Angeles County Sheriff's Department testified that defendant had admitted his membership in the Bloods on Point gang to Machanic on four or five occasions. Detective Richard Cartmill, the prosecution's gang expert, testified that Bloods on Point was a Bloods gang in the Antelope Valley. Its members were known to refer to one another as "Blood." The gang began as a "burglary crew in Palmdale," and "door-kick residential burglaries" were one of the gang's primary activities. In response to a hypothetical question based upon the prosecution's evidence, Cartmill opined that the burglary and robberies described in the question were committed for the benefit of the Bloods on Point gang because news of the brazen daytime residential takeover would spread through the community and cause intimidation, thus enabling the gang to commit more crimes because the public would not report crimes or resist the gang. In addition, the gang would be entitled to a share of the proceeds from the robbery.

Defendant's grandmother Brenda Green testified that defendant was living with her in Los Angeles at the time of the charged crimes and she recalled that he was at the

house the entire week of Valentine's Day, 2011. He would have been either in the house or in the backyard at the time of the charged crimes.

The parties stipulated that if defendant's cousin Tyren Green were called as a witness, he would testify that defendant got the tattoo on his neck in January of 2011.

Dr. Mitchell Eisen testified for the defense as an expert on eyewitness identification. He testified that a variety of circumstances can affect the accuracy of a witness's identification: distractions; stress and trauma; source confusion; facial features; unique identifying features such as piercings or tattoos; the length of exposure; prior familiarity; confusing a stranger associated with the event with the perpetrator; accepting information from someone else after the event; and attributes of the identification testing, such as the presence or absence of an admonition, experimenter bias, and seeing the same person in multiple identification tests. He further testified that a witness becomes more confident of the accuracy of his or her identification over time, but a witness's confidence did not necessarily correlate with his or her accuracy. In-court identifications are too temporally removed to constitute an identification test; they are instead assertions of a witness's belief. Eisen nonetheless conceded that witnesses "can and do [make] accurate identifications all the time."

The jury convicted defendant of first degree burglary and four counts of first degree robbery (pertaining to Jesse, Lashawn, Scales, and Vincent), and found that each crime was committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members. The jury found not true the allegations that a principal personally used a gun in the commission of each offense. Defendant admitted that he had one prior serious or violent felony conviction constituting a "strike." The court sentenced defendant to 46 years in prison, consisting of second strike terms of 12 years for burglary, plus 10 years for the gang enhancement, and four consecutive terms of 6 years for each robbery with the gang enhancement.

DISCUSSION

1. Sufficiency of evidence

Defendant contends the evidence was insufficient to support his conviction for robbing Vincent because "no personal property of [Vincent's] was taken" and "given his age, he did not have constructive possession over any of the property."

To resolve this issue, we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable jury could find guilt beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.) We presume the existence of every fact supporting the judgment that the jury could reasonably deduce from the evidence and make all reasonable inferences that support the judgment. (*People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Catlin* (2001) 26 Cal.4th 81, 139.)

Robbery is defined as the taking of personal property of some value, however slight, from a person or the person's immediate presence by means of force or fear, with the intent to permanently deprive the person of the property. (Pen. Code, § 211; *People v. Marshall* (1997) 15 Cal.4th 1, 34.) Robbery is an offense against the person. (*People v. Weddles* (2010) 184 Cal.App.4th 1365, 1369 (*Weddles*).) Any person who owns or who exercises direct physical control over, or who has constructive possession of, any property taken may be a victim of a robbery if force or fear is applied to such person. (*People v. Scott* (2009) 45 Cal.4th 743, 749–750 (*Scott*).)

"Constructive possession does not require an absolute right of possession. 'For the purposes of robbery, it is enough that the person presently has some loose custody over the property, is currently exercising dominion over it, or at least may be said to represent or stand in the shoes of the true owner.'" (*People v. DeFrance* (2008) 167 Cal.App.4th 486, 497.) "For constructive possession, courts have required that the alleged victim of a robbery have a 'special relationship' with the owner of the property such that the victim had authority or responsibility to protect the stolen property on behalf of the owner." (*Scott, supra*, 45 Cal.4th at p. 750.) "By requiring that the victim of a robbery have

possession of the property taken, the Legislature has included as victims those persons who, because of their relationship to the property or its owner, have the right to resist the taking, and has excluded as victims those bystanders who have no greater interest in the property than any other member of the general population." (*Id.* at pp. 757–758.) Civil Code section 50 establishes the right to use "necessary force" to protect the "property of oneself, or of a wife, husband, child, parent, or other relative, or member of one's family . . . ." Several published cases have upheld against insufficiency of evidence claims convictions for robbing victims of property belonging to their family members. (*People v. Gordon* (1982) 136 Cal.App.3d 519 [parents robbed of marijuana belonging to their adult son]; *DeFrance*, 167 Cal.App.4th 486 [mother robbed of car owned by her adult son]; *Weddles*, *supra*, 184 Cal.App.4th 1365 [man robbed of his brother's money].)

"Two or more persons may be in joint constructive possession of a single item of personal property, and multiple convictions of robbery are proper if force or fear is applied to multiple victims in joint possession of the property taken." (*Scott*, *supra*, 45 Cal.4th at p. 750.)

Vincent was four or five years old at the time of the robbery. The jury was instructed on actual and constructive possession and heard defense counsel's argument that Vincent was too young to be in possession of any property taken from the home.

Under Civil Code section 50, Vincent had authority to protect his parents' property, and thus had constructive possession of the money and other property that the robbers took. Vincent was not too young to be either unaware of the robbery or unable (if not forced into the bathroom) to resist the taking of his parents' property, by, for example shouting, phoning, or running to the home of a neighbor for help; running away with the property; or hiding the property. Lashawn's testimony that she comforted Vincent when they were forced into the bathroom supports a reasonable inference that Vincent was aware of the robbery. Notably, Scales wanted to put Vincent through the bathroom window so that he could go and get help. Had she done so, Vincent could have run to a neighbor's home and asked a neighbor to phone 911. Defendant and his accomplice

apparently considered it sufficiently necessary to overcome potential resistance by Vincent that they forced him into the bathroom with his mother and Scales.

Because multiple people may simultaneously possess a single item of personal property, the presence of Vincent's parents and Scales did not divest Vincent of his statutory authority to protect, or constructive possession of, his parents' property. "When two or more persons are in joint possession of a single item of personal property, the person attempting to unlawfully take such property must deal with all such individuals. All must be placed in fear or forced to unwillingly give up possession. To the extent that any threat may provoke resistance, and thus increase the possibility of actual physical injury, a threat accompanied by a taking of property from two victims' possession is even more likely to provoke resistance. [¶] We view the central element of the crime of robbery as the force or fear applied to the individual victim in order to deprive him of his property. Accordingly, if force or fear is applied to two victims in joint possession of property, two convictions of robbery are proper." (*People v. Ramos* (1982) 30 Cal.3d 553, 589, reversed in part on other grounds in *California v. Ramos* (1983) 463 U.S. 992 [103 S.Ct. 3446].)

We conclude that defendant's conviction of robbing Vincent was supported by both the law and substantial evidence.

2. Exclusion of evidence

Devin Lutcher was charged along with defendant in this case. On the day jury selection began, the prosecutor dismissed the case against Lutcher. The prosecutor explained the circumstances that led him to charge Lutcher, then to dismiss the case against him: "The victims on this case, what they ended up doing after they were robbed, they got some photographs from Facebook. Some of those included [defendant]. Some of those included Mr. Devin Lutcher. Based on that, they informed the police that these two individuals were the ones who ended up robbing them at the home. [¶] Both of these individuals were picked up and arrested. Six-packs are shown of Mr. Lutcher to the victims. The victims at some point identified Mr. Lutcher. And then at the preliminary

hearing, again, all the victims, there are three victims, identify Mr. Lutcher as being the individual who was in the house with the gun, along with [defendant]. [¶] What occurred thereafter was that information came down that there might be a person who looks extremely similar to Mr. Lutcher. My I.O. did some investigation and came across a photograph of another individual by the name of Parvin Tanner [phonetic], who does look remarkably like Mr. Lutcher. . . . [T]here was further information that Mr. Lutcher, roughly about an hour after this event occurred, was actually down in downtown being fired from his employer at the Ritz-Carlton. So we have verification of that. [¶] Now, having all that information, it then became incumbent upon me as to whether I was going to go forward as to Mr. Lutcher or not. [¶] Again, just based on personal knowledge of what I know the traffic pattern to be like going from here [Lancaster] to downtown on a Tuesday morning, it is difficult, but not impossible, to make it down there. [¶] On the other hand, I did have this information that Parvin Tanner looked extremely like Mr. Lutcher. My I.O. contacted Parvin Tanner, asked him some questions. Parvin Tanner never admitted to being involved in the case, although he's made some statements like, well, my fingerprints might be in the house because I might have been there some time at a prior event, and then gave no further information. [¶] So, again, based on all that information, it was the prosecution's belief that our case may not rise to the level to proceed forward, and that's why I announced unable to proceed. I didn't dismiss under 1385. I said, we were unable to proceed because we have insufficient evidence at this point."

The prosecutor also told the court that his investigating officer had nothing to do with his decision not to proceed against Lutcher at that time, and emphasized that "at this point, we don't know if there is a misidentification or not." He continued, "I have just stopped the prosecution as to Mr. Lutcher based on the standards that I, as a prosecutor, have to meet at certain points."

Defense counsel informed the court that he wanted "to ask the detective, you went to Los Angeles a few days ago? You were there to speak to the employers of Mr.

Lutcher, who was the taller defendant in this case? And based on your investigation, you learned that he was at an exit interview at his employer's office in downtown Los Angeles at ten o'clock on the day of the robbery? [¶] And I'd like to further ask him: On December 7th of this year, you interviewed a man at the Central Jail named Parvin Tanner and he appeared to you to look—to resemble Mr. Lutcher? [¶] You spoke to him about his possible involvement in the case? [¶] You asked a ruse question to try to get a response? [¶] You told him that his fingerprints were found at the crime scene when they were really not? [¶] And then he looked down at his shoes and said something about, 'Maybe I was there in the past.'"

Defense counsel continued, "I want to be able to ask the witnesses: At the preliminary hearing, you identified that [*sic*] Mr. Lutcher as the gunman; correct? You pointed him out in court. You were very sure that the tall defendant that you saw in court was the gunman. [¶] Would you change your mind if you knew that someone else is being investigated as being the tall intruder? And the person you ID.ed [*sic*] is no longer being charged at this time? [¶] I think that is proper impeachment based on a person's, a witness's ability to perceive events and to recollect those events. This case is all about eyewitness identification. And if they have identified somebody who can be shown wasn't there, that was actually in downtown Los Angeles that morning, that reflects on their ability to accurately identify my client. And it is something I really need to explore with these witnesses."

The prosecutor objected that statements made to his investigator by Lutcher's employer and Tanner were hearsay. With respect to the victim witnesses, the prosecutor objected, "There is no impeachment in this case because there is no proof, there is no evidence that Parvin Tanner or some other individual committed this crime. The reason I dismissed this case is because I have my standard as a prosecutor to abide by in order to go forward in the case. [¶] I don't know if I met that standard or not; and, therefore, I dismissed this case. However, it may be that all the Blaylocks are absolutely correct when they say it was Devin Lutcher who did the robbery, that he's the one who had the

gun. So there is no impeaching them at this point. There is nothing to impeach them with."

Defense counsel noted that the prosecutor had told him that he had instructed his investigator not to show the victim witnesses a photograph of Tanner, and counsel would like to question the investigator about why he did not show them the photograph. He added that he would like to show Tanner's photograph to the jury.

The trial court excluded all evidence regarding Tanner pursuant to Evidence Code section 352. (Undesignated section references are to the Evidence Code.) The court explained that the evidence regarding Tanner was not "even a classic case of impeachment because at this time, it sounds like, if anything, there is ongoing investigation as to Mr. Lutcher. So at this point, that would entail a mini trial and probable undue speculation by the jurors in terms of impeachment value of these victims as to Mr. Lutcher. He is not in issue. Their identification, however accurate it might be, should be focused on Mr. Jones, not Mr. Lutcher. [¶] The Court, under [section] 352, finds that any probative value regarding this additional evidence would be substantially outweighed by these concerns."

The court continued, "What I am going to allow questioning, and then I am going to cut it off after this point, is you will be allowed to ask anything regarding six-pack identifications regardless of whether it is [defendant] or Mr. Lutcher. But for [section] 352 reasons, we will not be going into the site [*sic*] investigations or site [*sic*] concerns as to Mr. Lutcher and this gentleman, Mr. Tanner. . . . [F]or similar reasons, that photo showing Mr. Tanner and Mr. Lutcher side by side will not be mentioned nor will it be shown to the witnesses. It has very little, if any, probative value as to their identification as to Mr. Jones."

The court added, "Similarly, the additional facts elicited, separate and apart from the fact that it would be hearsay to—for the investigating officer to testify as to what Mr. Lutcher's employer said, the court similarly has [section] 352 concerns regarding this, speculating as to the time to drive from [*sic*] the Ritz-Carlton. That, again, puts the focus

on Mr. Lutcher, not [defendant]. So under [section] 352, and I will note this is over defense objection, those types of details will be excluded."

Defendant contends that the trial court abused its discretion and violated defendant's confrontation and due process rights by excluding evidence that Jesse, Lashawn, and Scales may have misidentified Lutcher as defendant's accomplice and evidence of the prosecution's decision to dismiss the case against Lutcher. He argues that such evidence was relevant to show that the victim witnesses' identification of defendant "was quite possibly similarly flawed." He further argues that introducing such evidence would not have resulted in a mini-trial or unduly consumed time because "[n]one of the evidence was complicated and would not have taken long to present." Defendant further argues that testimony by the prosecutor's investigator regarding statements made by Lutcher's employer and by Tanner would not have been hearsay because he would not have been offering such statements for their truth, but to instead explain why the prosecutor dismissed the case against Lutcher. In addition, he argues, Tanner's statements were a declaration against interest. Defendant argues he also should have been able to ask Eisen about the possible misidentification because hypothetical questions based upon the facts of a case are permissible.

Evidence is relevant if it has any tendency in reason to prove or disprove any disputed fact of consequence to the determination of an action. (§ 210.) Section 352 provides that the court may, in its discretion, exclude relevant evidence if its probative value is substantially outweighed by the probability that its admission will either be unduly time consuming or create a substantial danger of undue prejudice, confusion of the issues, or misleading the jury.

We review any ruling on the admissibility of evidence for abuse of discretion. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113, disapproved on another point in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) This standard of review applies to both a trial court's determination of the relevance of evidence and its determination under section 352 of whether the evidence's probative value is substantially outweighed by its

prejudicial effect. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

We first address the trial court's exclusion of evidence of the prosecutor's dismissal of the case against Lutcher. Defendant did not seek to introduce evidence of the dismissal. Indeed, defense counsel expressly agreed with the trial court when the court stated that the dismissal of Lutcher had no relevance and would "result in mini trial and cause undue speculation under [section] 352." Accordingly, that issue was not preserved for appeal.

As far as the record reveals, the robbery began about 7:50 a.m. and lasted approximately 30 minutes. Accordingly, it would appear that more than one hour elapsed between the conclusion of the robbery and Lutcher's meeting with his employer in downtown Los Angeles. The prosecutor noted that it was difficult, but not impossible to travel from Lancaster to downtown in an hour. Thus, Lutcher's alibi for 10:00 a.m. did not establish that he was not defendant's accomplice in the commission of the charged crimes. Similarly, Tanner's statements about his fingerprints did not establish that he was the actual accomplice. Defense counsel, who had seen a photograph of Tanner, did not dispute the prosecutor's assertion that Tanner looked "remarkably like Mr. Lutcher." Because the two men were "remarkably" similar in appearance and it had not been established that Tanner, not Lutcher, was defendant's accomplice, the possibility that the victims misidentified Lutcher had no tendency to show that they also misidentified defendant. Indeed, given the "remarkably" similar appearance of Lutcher and Tanner and the failure of police to show the victims a photograph of Tanner, any mistake by the victims in selecting Lutcher's photo was reasonable and had no tendency to show that they lacked the ability to accurately identify defendant as one of the robbers. Accordingly, the inference defendant hoped to have jurors draw would have been based only upon speculation that (1) Tanner was the actual accomplice, (2) the victims would not have selected Tanner if given an opportunity to compare him to Lutcher, and (3) the victims' purported inability to select the correct man from two remarkably similar-looking men suggested they also misidentified defendant, who had a distinctive piercing that the

victims saw during the robbery but which was not shown in defendant's photograph in the six-pack array, and whom each victim had seen on at least one prior occasion. The "exclusion of evidence that produces only speculative inferences is not an abuse of discretion." (*People v. Babbitt* (1988) 45 Cal.3d 660, 684 (*Babbitt*).)

In addition, as the trial court concluded, evidence that the victims might have misidentified Lutcher would have necessitated a mini-trial regarding whether Lutcher or Tanner was defendant's accomplice. In addition to defendant's attempt to prove that Tanner was the accomplice, the prosecutor, who did not concede the victims had misidentified Lutcher, would probably have attempted to show that Lutcher could have been the accomplice and, even if he was not, that any mistake by the victims was reasonable. Because a possible mistake in identifying Lutcher was irrelevant to defendant's guilt, this would have caused an *undue* consumption of time, even if, in absolute terms, it did not consume very much time. Of equal importance, it would have diverted the jury's focus to an irrelevant issue and potentially have misled the jury or confused the issues.

In addition, testimony by the prosecutor's investigator regarding statements by Lutcher's employer to the effect that Lutcher was at his workplace at 10:00 a.m. on the day of the robbery would have been hearsay. Defendant wanted to use that statement to show that Lutcher had an alibi for the time of the robbery, and was thus seeking to introduce such a statement for its truth.

Accordingly, we conclude the trial court did not abuse its discretion by excluding the evidence regarding Lutcher's partial alibi and the possibility that Tanner was defendant's accomplice.

Although "Evidence Code section 352 must yield to a defendant's due process right to a fair trial and to the right to present all relevant evidence of *significant* probative value to his or her defense" (*People v. Cunningham* (2001) 25 Cal.4th 926, 999), neither the right to present a defense nor the right to confront witnesses permits a defendant to introduce irrelevant or marginally relevant evidence. (*Babbitt*, *supra*, 45 Cal.3d at p. 684;

Delaware v. Van Arsdall (1986) 475 U.S. 673, 679 [106 S.Ct. 1431].) Accordingly, the trial court's ruling did not violate defendant's rights to due process or confrontation.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.